

82-1600

Office - Supreme Court, U.S.
FILED

MAR 25 1983

ALEXANDER L. STEVAS,
CLERK

No.

IN THE
Supreme Court of the United States

TERM, 198

WILLIAM GIBBONS, Trustee of the Property of
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

v.

NATIONAL STEEL SERVICE CENTER, INC.,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

BENNETT A. WEBSTER
BRUCE E. JOHNSON
ARTHUR E. GAMBLE
GAMBLE, RIEPE, BURT,
WEBSTER & DAVIS
2600 Ruan Center
Des Moines, Iowa 50309

O. L. HOUTS
CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY
332 So. Michigan
McCormick Building
Chicago, Illinois 60604
Attorneys for Petitioner

QUESTION PRESENTED

I. Does federal transportation law and national transportation policy preempt the power of the Iowa State Court to assess a civil penalty in the form of liability without fault upon an interstate rail carrier hauling hazardous substances pursuant to mandatory federal requirements and in conformity with the requirements of federal and state law?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement	4
The Facts of the Case	5
The Decision of the District Court	6
The Decision of the Supreme Court of Iowa	6
The Decision of the Court of Appeals	7
Reasons for Granting the Writ	8
I. The Court Below Erred In Holding That Federal Transportation Law And National Transportation Policies Do Not Preempt The Power Of The Iowa State Court To Assess A Civil Penalty In The Form Of Liability Without Fault Upon An Interstate Carrier Who Carried A Hazardous Cargo Pursuant To Its Federal Duty And Acted In Conformity With The Requirements Of Federal And State Law And Regulations And Without Negligence	8
Conclusion	18

Appendix:

A. District Court Opinion	A-1
B. District Court Judgment	A-6
C. Iowa Supreme Court Opinion on Certified Question of Law	A-7
D. Court of Appeals Opinion	A-18
E. Table of Contents of Petitioner's Brief in the Court of Appeals for the Eighth Circuit filed prior to Certification to the Supreme Court of Iowa	A-22
F. Table of Contents of Petitioner's Reply Brief in the Court of Appeals for the Eighth Circuit filed prior to Certification of the Supreme Court of Iowa	A-24

TABLE OF CASES CITED

Actisselskabet Ingrid v. Central R. Co. of New Jersey, 216 F 72, 78 (2nd Cir. 1914), rehearing denied, 216 F 991 (2nd Cir. 1914), cert. denied, 238 US 615, 35 S.Ct. 284, 59 L.Ed. 1490 (1915)	10
Arizona Public Service Co. v. Snead, 441 U.S. 141, 150, 99 S.Ct. 1629, 1634, 60 L. Ed.2d 106, 113 (1979) ..	8
Cairl v. City of St. Paul, 368 N.W.2d 908 (Mn. 1978) ...	15
Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 250 U.S. 311, 318, 101 S.Ct. 1124, 1130, 67 L. Ed.2d 258, 265 (1981)	8,12

Christ Church Parish v. Cadet Chemical Corp., 199 A2d 707, 708-709 (Conn. 1964)	10
Clearfield Trust Co. v. U.S., 318 U.S. 363; 87 L. Ed. 838; 63 S.Ct. 754 (1943)	13
Fort Worth and Denver Railway Company v. Beauchamp, 95 Tex. 496, 68 SW 502, 504 (1902)	10
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)	8
Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co., 693 F.2d 819 (8th Cir. 1982)	17, 18
Hines v. Davidowitz, 312 U.S. 52, 67-68, 61 S.Ct. 399, 404-05, 85 L. Ed. 581, 586-88 (1941)	8
Northern States Power Co. v. Minnesota, 447 F.2d 1143 (1971) aff'd. Mem. 405 U.S. 1035, 31 L. Ed.2d 576, 92 S.Ct. 1307	11
Maryland v. Louisiana, 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L. Ed.2d 576, 596 (1981)	8
Pecan Shoppe, etc. v. Tri-State Motor Transit Co., 573 S.W.2d 431 (Mo. App. 1978)	15
Perez v. Campbell, 402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L. Ed.2d 233, 242 (1971)	8
Pope v. Edward M. Rude Carrier Corp., 75 SE2d 584, 589-590 (W. Va. 1953)	10
Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L. Ed. 1447, 1459 (1947)	8
San Diego Unions v. Garmon, 359 U.S. 236, 247, (1959)	12

Silkwood v. Kerr-McGee Corp., 667 F2d 098 (1981)	4,11,16
Southern Pacific Transp. Co. v. U.S., 462 F. Supp. 1193	12,13,
	14,15
Town of East Troy v. Soo Line Railroad Company, 409	
F Supp. 326, 329-330 (E.D. Wisc. 1976)	10
Train v. Colorado Public Interest Research Group, 426	
U.S. 1, 17, 48 L. Ed.2d 434, 96 S.Ct. 1938 (1976) . .	11

MISCELLANEOUS

U.S. Const. Art. VI, cl. 2	2,8,16
Federal Boiler Inspection Act, 45 U.S.C. § 22, <i>et seq.</i> . .	
Federal Employers Liability Act, 45 U.S.C. § 51, <i>et seq.</i>	
Federal Hazardous Materials Transportation Act, 49	
U.S.C. §§ 1801-1812	3,9,12,13,17
Federal Railroad Safety Act, 45 U.S.C. §§ 421, <i>et seq.</i> . .	2,9,12,
	14,18
Federal Safety Appliance Act, 45 U.S.C. § 1, <i>et seq.</i> . . .	
Federal Transportation of Explosives Act, 18 U.S.C.	
§ 831, <i>et seq.</i>	
Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379,	
as codified by the Transportation Act of February	
28, 1920, ch. 91, 41 Stat. 457	
Interstate Commerce Act, as amended by the Act of Sep-	
tember 18, 1940, ch. 722, 54 Stat. 788	
Railroad Revitalization and Regulatory Reform Act of	
1976, P.L. 94-210, Section 306, 90 Stat. 54 (now	
appearing in part as 45 U.S.C. §§ 801, <i>et seq.</i> ; The	
4-R Act)	

Regional Rail Reorganization Act of 1973, P.L. 93-236, 87 Stat. 985 (now appearing at 45 U.S.C. §§ 701 <i>et</i> <i>seq</i> ; The 3-R Act)	
Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (now appearing as 49 U.S.C. §§ 10101, <i>et seq.</i>)	17
Restatement of the Law of Torts, Second, § 521	10

No.
IN THE
Supreme Court of the United States
TERM, 198

WILLIAM GIBBONS, Trustee of the Property of
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Petitioner,

v.

NATIONAL STEEL SERVICE CENTER, INC.,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

William Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company ("Trustee") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on December 2, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Ap. A-18) is reported at 693 F. 2d 819 (1982). The opinion of the Supreme Court of Iowa certifying a question of state law to the Eighth Circuit is reported at 319 NW2d 269 (Iowa 1982). The opinion of the United States District Court for the Southern District of Iowa is unreported.

JURISDICTION

Judgment of the Court of Appeals was entered on December 2, 1982. The Trustee's Petition for Rehearing was denied on December 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, cl. 2 of the Constitution of the United States provides:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Federal Railroad Safety Act, 45 U.S.C. § 421, provides:

“The Congress declares that the purpose of this Act is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damages to property caused by accidents involving any carrier of hazardous materials. (Oct. 16, 1970, P.L. 91-458, Title I, § 101, 84 Stat. 971).”

Federal Railroad Safety Act, 45 U.S.C. § 434, provides:

“The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary had adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional

or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. (Oct. 16, 1970, P.L. 91-458, Title II, § 205, 84 Stat. 972.)

Section 1811 of the Hazardous Materials Transportation Act provides:

“(a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.

“(b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.”

STATEMENT

Recent amendments to the Interstate Commerce Act and other Acts of Congress have expanded federal regulations of interstate carriers by rail and thus restricted allowable state regulation to the extent that novel questions of federal preemption law arise when the federal regulatory scheme overlaps with areas of traditional state tort law jurisdiction. This is such a case.

Broadly stated, this case involves the question of whether the pervasive federal legislation regulating railroads and railroad safety preempt state law so as to forbid a state, under the guise of tort law, from imposing a civil penalty in the form of damages on a rail carrier where an accident occurs without the carrier's fault while it is transporting hazardous material, pursuant to its federally mandated duty and in compliance with federal regulations. This is virtually a companion case to *Silkwood v. Kerr-McGee Corp.*, *infra*, pending in this Court and involves what is essentially a conflict between the Eighth and Tenth Circuits on Federal preemption law.

Iowa, for the first time, seeks to impose liability without fault on an interstate rail carrier hauling dangerous cargo in performance of its mandatory statutory duty under federal law. Iowa did not impose liability in this case for the purpose of dealing with an essentially local hazard or condition, such as regulating speed of trains or rail crossing protection. Iowa instead imposed a civil penalty (in the guise of tort liability) on an interstate rail carrier activity mandated by federal law despite the fact the rail carrier did not violate any state or federal statute, regulation, or common law rule of conduct. In enlarging its field of tort liability, Iowa seeks to cast burdens on interstate rail carriers in matters not involving essential local interests and in a manner now clearly forbidden by the federal statutory and regulatory scheme. The court of Appeals for the Eighth Circuit regarded the question as one of state tort law and certified the question of

absolute liability to the Iowa Supreme Court.¹ The Iowa Court held that a carrier was absolutely liable for damage from an explosion on the railroad, even though the jury in the United States District Court had found the railroad to be free from any negligence, even under the doctrine of *res ipsa loquitur*. The Eighth Circuit then affirmed the judgment of the United States District Court which held as a matter of law that the railroad was absolutely liable. This result requires granting of certiorari by this Court for consideration of this novel and important preemption question.

The Facts Of The Case

On September 1, 1975, at Des Moines, Iowa, tank cars of propane exploded on the Trustee's line of railroad. An extensive investigation by two federal agencies followed and no violations of federal law were shown. Both the track, which had been rebuilt shortly before, the cars and all equipment fully met federal standards. It was shown at the trial that federal regulations required the Trustee to accept the propane cars at the Inver Grove, Minnesota exchange point and carry them through Iowa to Missouri. Damage was caused to the property of National Steel Service Center, Inc. ("National Steel") Which was paid by its insurance company.

On June 11, 1976, the insurance company in the name of National Steel commenced this action by filing a Complaint in the United States District Court for the Southern District of Iowa. On March 17, 1980, a jury trial was held before the Hon. R. E.

¹Petitioner moved for certification to the Supreme Court of Iowa, as a determination that an interstate railroad is not liable, absent fault, for damages arising from carrying a hazardous substance, the majority view in this country and followed by *Restatement Torts 2d*, would have made decision of the preemption question unnecessary. The federal preemption question was, however, preserved.

Longstaff, United States Magistrate. At the conclusion of the evidence, National Steel moved for a directed verdict on the issue of liability without fault. The Trial Court reserved ruling on National Steel's motion. On March 21, 1980, the issue of negligence under the doctrine of *res ipsa loquitur* and the issue of damages were submitted to the jury by special verdict. The jury found that the Trustee was *not negligent*, even under the presumption of negligence permitted under the doctrine of *res ipsa loquitur*. It found National Steel's damages to be \$443,625.

On March 26, 1980, the Trustee filed a motion for directed verdict and entry of judgment for defendant, in conformity with the jury's answer to the Interrogatory finding no negligence.

The Decision of the District Court

On March 27, 1980, the Trial Court entered an Order denying the Trustee's motion for directed verdict and entering judgment in favor of National Steel on the basis of liability without fault. (Magistrate's Opinion, A. p. A-1) On March 28, 1980, the Hon. Harold Vietor, Judge of the District Court, adopted Magistrate Longstaff's Order. The Trustee appealed to the United States Court of Appeals for the Eighth Circuit. On May 22, 1981, the Eighth Circuit Court of Appeals certified the question of liability without fault under state law to the Supreme Court of Iowa. (A-18)

The Decision of the Supreme Court of Iowa

On May 19, 1982, the Supreme Court of Iowa filed its opinion, holding that under the circumstances of the case, a railroad carrier was liable without fault, a new concept in Iowa law, and rejected the *Restatement's* position and the previous common law rule that a common carrier was not liable, lacking fault, under such circumstances. (A. p. A-7)

The Decision of the Court of Appeals

On December 2, 1982, the judgment of the United States District Court, holding the Trustee liable for damages without fault arising from the explosion under state law was affirmed by the Eighth Circuit on the basis of the opinion of the Supreme Court of Iowa which did not consider the pre-emption question. (Ap. p. A-18)² On December 28, 1982, the Eighth Circuit overruled the Trustee's Petition for Rehearing on the Pre-emption question.

² The Eighth Circuit Court's statement in refusing to consider the federal preemption question that "subsequent" to the decision of the Iowa Supreme Court The Rock Island (Trustee) filed briefs with the Circuit raising the federal preemption question and that the Circuit "implicitly decided this question against the Rock Island" when it agreed to certify the question of liability without fault to the Supreme Court is in error. In fact, the Trustee raised the federal preemption question in the Eighth Circuit prior to the certification to the State Court and clearly preserved the federal question which would have been mooted had the Iowa Court followed existing law and the *Restatement*. The Trustee, in his Reply Brief in the Circuit, stated: "However, in the factual contest of the present case, the issue of preemption need not be reached by this Court because the Iowa common law common carrier exception to liability without fault for abnormal hazardous activity is dispositive of the case". (See Table of Contents of the Trustee's Eighth Circuit Briefs, A. p. pp. A-22—A-24).

REASONS FOR GRANTING THE WRIT

I. The Court Below Erred In Holding That Federal Transportation Law And National Transportation Policies Do Not Preempt The Power Of The Iowa State Court To Assess A Civil Penalty In The Form Of Liability Without Fault Upon An Interstate Carrier Who Carried A Hazardous Cargo Pursuant To Its Federal Duty And Acted In Conformity With The Requirements Of Federal And State Law And Regulations And Without Negligence.

It is elementary that under the Supremacy Clause of the United States Constitution state laws which "interfere with, or are contrary to the laws of Congress" are invalid. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824); *Maryland v. Louisiana*, 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L. Ed.2d 576, 596 (1981); *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 150, 99 S.Ct. 1629, 1634, 60 L. Ed.2d 106, 113 (1979). A state law is invalid not only when it directly conflicts with federal legislation but also where it " 'stands as an obstacle to the full purposes and objectives of Congress.' " *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L. Ed.2d 233, 242 (1971), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67-68, 61 S.Ct. 399, 404-05, 85 L. Ed. 581, 586-88 (1941). Moreover, where "the federal government *** has enacted a complete scheme of regulation *** states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations." *Hines v. Davidowitz*, 312 U.S. at 66-67, 61 S.Ct. at 403-04, 85 L. Ed. at 586-87. See also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947).

Federal regulatory schemes applicable to interstate rail roads are particularly dominant and preemptive of state authority, as this Court held recently in a case arising in Iowa. *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*,

450 U.S. 311, 318, 101 S.Ct. 1124, 1130, 67 L. Ed.2d 258, 265 (1981).

The federal regulatory scheme applicable to railroads has become even more pervasive over the past decade. Commencing with the enactment of the Railroad Safety Act of 1970, 45 U.S.C. § 421, *et seq.*, Congress engaged in an extensive overhaul of railroad safety regulation and the Interstate Commerce Act for the purpose of eliminating burdens on interstate railroads, in order to make railroads and the national railroad system economically viable and competitive with other modes of transportation and to improve railroad safety. The legislative overhaul included adoption of the Federal Hazardous Materials Transportation Act in 1975, the 4-R Act in 1976 and the Staggers Act in 1980 which, among other things, called for the development of a national transportation policy.

The Railroad Safety Act of 1970, *supra*, affirmatively stated Congressional purpose to "promote safety in all areas of railroad operations" and declares that "*standards relating to railroad safety shall be nationally uniform to the extent practicable*". A state, under the Act, may adopt or continue a rule "when necessary to eliminate or reduce an essentially local safety hazard ... and ... not creating a burden on interstate commerce". The Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812, specifically covers the transportation by interstate carriers of hazardous materials. The Act authorizes the Secretary of Transportation to designate hazardous materials specifically including "flammable liquids ... and compressed gases", which includes propane gas. The Act provides that any state requirement which is inconsistent with the Act "is preempted". It further provides that such requirements are not preempted only if the Secretary determines that such regulations are proper and do "not unreasonably burden commerce". This Act took effect on January 3, 1975, prior to this accident (Pub.

L. 93-633; for legislative history see 1974 U.S. Code, Cong. and Adm. News, p. 7669).

There was no violation by the Trustee of the federal Hazardous Materials Transportation Act or any other act or regulation. Instead, the State of Iowa seeks to extend its common law into this field and impose a civil penalty on the carrier where there has been a specific finding by a jury applying state tort law of no fault by the carrier.

Subsequent to this finding by the jury, the Iowa Supreme Court held for the first time with two judges dissenting that the common carrier exception to absolute liability for carrying hazardous material recognized by the *Restatement*³ and an overwhelming majority of the Courts will not apply in Iowa, but that a carrier will be absolutely liable without any fault for carrying on an activity required of it by law in a safe manner and in a manner contemplated by the federal statutory scheme. In short it makes the rail carrier the insurer; (in this case, the Trustee becomes the insurer of the subrogating insurance company, Allendale Mutual).

³ §521 of Restatement (Second) of Torts:

521. Abnormally Dangerous Activity Carried on in Pursuance of a Public Duty.

"The Rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.

And see *Town of East Troy v. Soo Line Railroad Company*, 409 F Supp. 326, 329-330 (E.D. Wisc. 1976); *Fort Worth and Denver City Railway Company v. Beauchamp*, 95 Tex. 496, 68 SW 502, 504 (1902); *Actiesselskabet Ingrid v. Central R. Co. of New Jersey*, 216 F 72, 78 (2nd Cir. 1914), *rehearing denied*, 216 F 991 (2nd Cir. 1914), *cert. denied*, 238 US 615, 35 S.Ct. 284, 59 L.Ed. 1490 (1915); *Christ Church Parish v. Cadet Chemical Corp.*, 199 A2d 707, 708-709 (Conn. 1964); *Pope v. Edward M. Rude Carrier Corp.*, 75 SE2d 584, 589-590 (W.Va. 1953);

Closely in point and illustrative of Petitioner's position is the recent Tenth Circuit decision in *Silkwood v. Kerr McGee Corp.*, 667 F2d 908 (1981) (appeal to this Court filed May 20, 1982, (No. 81-2159) pending on motion to dismiss, and see 103 S.Ct. 46.) In an action for personal injuries from radiation involving violations of regulations of the Atomic Energy Commission, the Tenth Circuit held that the Atomic Energy Act of 1954, 42 U.S.C. § 2011, *et seq.* preempts the right of an individual to recover punitive damages in a tort action. In that case the defendant did, in fact, violate AEC regulations in the conduct of its plant operations and was liable for actual damages, but the Court held that penalties provided by the AEC were exclusive and that punitive damages could not be awarded as they constitute a penalty in addition to the penalties provided by the Act. The situation is identical here, except that here there was no violation of any regulation. Plaintiff here could recover if there had been a violation of regulations or a violation of a common law duty protecting the local interest, which it did not. Instead, the Iowa Supreme Court wishes to impose what is in the nature of a punitive penalty against the defendant. The *Silkwood* Court cites *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (1971) *aff'd*. Mem., 405 U.S. 1035, 31 L.Ed.2d 576, 92 S.Ct. 1307 and *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 17, 48 L. Ed.2d 434, 96 S.Ct. 1938 (1976). The *Silkwood* Court states, at p. 923:

* * * We cannot read that case [Northern States Power] and *Train* other than as requiring us to hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material. A judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is no less intrusive than direct legislative acts of the state. Thus we hold punitive damages may not be awarded in this case.

Similarly, state action which competes substantially with the Hazardous Materials Transportation Act and the Railroad Safety Act must also be held to be preempted.

State common law that levies a civil damage penalty regulates the activity involved as effectively as a state regulation. This Court said in *San Diego Unions v. Garmon*, 359 U.S. 236, 247 (1959):

[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Quoting *Garmon*, this Court stated in *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, *supra*, at 450 U.S. 317-318:

And in deciding whether any conflict is present, a court's concern is necessarily with "the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *San Diego Building Trades Council v. Garmon*, *supra*, at 243.

In *Kalo* state law damage actions were held preempted by federal statutes and regulations governing rail line abandonment. Likewise, the award of damages in this case regulates by penalty interstate rail service that was carried on pursuant to federal duty, in compliance with all federal statutes and regulations, in compliance with all state statutes and regulations, *and* in compliance with all common law governing conduct in relation to an essentially local condition.

The question of federal preemption in this area is perhaps best discussed in Judge MacBride's masterful opinion in *Southern Pacific Transp. Co. v. U.S.*, 462 F. Supp. 1193. In that case, the sole question was whether federal or state law pro-

vided the rule of decision governing the application of contributory or comparative negligence standards in a federal tort claims act case. However, Judge MacBride gives an extended discussion of federal preemption, and particularly the *Clearfield Trust* doctrine.⁴ *Southern Pacific* holds that state law incorporated into federal law applies in federal tort Claims actions because it is specifically mandated by the Federal Tort Claims Act. However, in discussing the entire field, Judge MacBride reviews important principles which are applicable to the present case and must ultimately be determined by this Court:

1. "If the particular question is one that arises from and bears heavily upon a federal regulatory program then the *Clearfield* doctrine will require the court to apply federal law to that question. That is the preemption decision". *Id.* p. 1208.
2. "An independent federal rule or decision must be applied when a genuine federal interest would be subjected to uncertainty by application of disparate state rules." *Id.* p. 1208.
3. "State laws that directly conflict with the purposes of the federal regulatory program are inappropriate for adoption and a court faced with conflicting state law would adopt a federal rule." *Id.* p. 1208.
4. "Preemption may be proper in suits wholly between private parties". *Id.* p. 1208.

It is true that Judge MacBride considered, in passing, the effect of the Hazardous Materials Act on the question of federal preemption and concluded that Congress did not intend to "encompass the question of tort liability within the framework of

⁴ *Clearfield Trust Co. v. U.S.*, 318 U.S. 363; 87 L. Ed. 838, 63 S. Ct. 754 (1943).

federal law''. However, Petitioner submits that (1) The remark is dictum; (2) That the Act post-dated the *Southern Pacific* occurrence; and (3) That the question of allowing the states to assess an additional penalty beyond that set forth by Congress, in the form of punitive damages or absolute liability, was not an issue in *Southern Pacific*. Finally, Judge MacBride considers the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421, *et seq.* The court states at pp. 1224-1225:

* * * Unlike the Safety Appliance Acts which dealt with specific areas of railroad safety, the 1970 Act's declared purpose is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials.

45 U.S.C. § 421. Section 434 of the Act provides:

"The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety *shall be nationally uniform to the extent practicable*. A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety *when necessary to eliminate or reduce an essentially local safety hazard*, and when not incompatible with any Federal law, rule, regulation, order, or standard, *and when not creating an undue burden on interstate commerce*." *Southern Pacific* did not focus on this Act in argument that federal common law should govern the field of railroad tort liability. This court has been unable to discover any decisions under the Act which support the development of such a federal common law to

supplant state common or statutory law rules such as contributory negligence. Nonetheless, *the Act evinces a clear congressional intent to preempt the regulation of railroad safety, and the cases interpreting the Act recognize that intent.* * * * [Emphasis added]

Southern Pacific only involved a question of whether Nevada or California law should apply on the issue of contributory negligence or comparative negligence. It held that no federal common law rule would be applied, but it did not involve questions of policy going beyond state law and essential local interests such as are involved here and were involved in *Silkwood*.

Iowa's rule of liability without fault is not a standard relating to railroad safety "necessary to eliminate or reduce as essentially local safety hazard". It merely says that a railroad which has complied with every known safety regulation law or standard, and is without any fault must nevertheless pay damages (a civil penalty) because it was required by federal law to have possession of a hazardous material. This clearly creates an "undue burden on interstate commerce", forbidden by Congress.

All the federal railroad safety and regulatory laws must be read together. There is no more persuasive field of federal regulation. Together they entirely preempt the field and forbid the states from assessing additional penalties on rail carriers. These questions have never been directly determined by this Court. Why should a railroad be assessed a penalty by the State of Iowa for carrying this material when such penalty would not be permitted in adjoining states?⁹ This is the national uniformity question which Congress has mandated and which this Court must now address.

⁹ The Trustee would not have been held liable without fault under State law if the propane had exploded in Minnesota, *Cairl v. City of St. Paul*, 268 NW2d 908 (Mn. 1978), or in Missouri, *Pecan Shoppe, etc. v. Tri-State Motor Transit Co.*, 573 S.W.2d 431 (Mo. App. 1978).

It is Petitioner's position that (1) There is a genuine and identifiable federal interest in railroad safety regulation and the transportation of hazardous materials; (2) That when rights and duties of the parties involve questions beyond essential local interests that they derive from a federal source and are substantially related to a pervasive federal regulatory program; (3) that given this federal source, the Supremacy Clause and the doctrine of federal preemption require that this Court apply a federal rule of decision by limiting penalties to those prescribed by Congress; (4) that ordinary state law may be applied so long as that law protects "essential local interests" and does not "burden commerce". However, when local law directly impinges upon the federal statutory scheme by the application of extreme penalties, such as in this case, which do not protect essential local interest and which do burden commerce, then such local rule is preempted by federal law and such penalty is not permitted.

Thus, in this case, the Federal District Court properly submitted the case to the jury for a determination of damages and a determination of negligence under Iowa law and applicable federal statutes, but once the jury determined that there was no negligence and that the railroad was without fault and there was no showing whatsoever of a violation of any federal statute or regulation, that the states cannot independently be permitted to assess another civil penalty upon carriers in the form of liability without fault. This determination must be made by the Federal Courts independent of state law, as the federal law is preemptive. This is the *Silkwood* rule.

Thus, the Magistrate erred in determining that Iowa law applied requiring liability without fault and that the Eighth Circuit erred in applying the Iowa minority position and in giving no consideration of Petitioner's preemption argument.

The Hazardous Materials Transportation Act provides for penalties only for a knowing or willful violation of its provisions. The Iowa Supreme Court, in the absence of any violation of the Act, knowing or unknowing, seeks to penalize the Trustee and all other common carriers by awarding money damages against them when a hazardous material justifies its name. That penalty is in direct conflict with 49 U.S.C. § 1811, which specifically preempts any state law which is inconsistent with any requirement or regulation under the Hazardous Materials Transportation Act, unless upon the application of the appropriate state agency the Secretary of Transportation determines that the state requirement affords a level of protection to the public equal to or greater than the federal requirement, *and* does not unreasonably burden commerce. No such application has been made; the Secretary has made no such finding.

One of the grounds for the penalty imposed by the Iowa Supreme Court was that it would encourage the development of superior safety technology, and would help prevent the occurrence of accidents involving hazardous materials. That responsibility, however, was delegated by Congress to the National Transportation Safety Board. 49 U.S.C. § 1903(a)(1)(c) states that the Board is responsible for investigating the causes of railway accidents involving substantial property damage. It did so in this case. So did the Federal Railway Administration. As a corollary of its investigative duties, the Board is empowered to “... evaluate the adequacy of safeguards and procedures concerning the transportation of hazardous materials ...” 49 U.S.C. § 1903(a)(8).

Recently, the United States Court of Appeals for the Eighth Circuit, in *Hayfield Northern Railroad Co., Inc. v. Chicago and North Western Transportation Co.*, 693 F.2d 819 (8th Cir. 1982), has effectively confirmed the dominance and per-

vasiveness of the Interstate Commerce Act. *Hayfield* holds that such Act, as amended in 1980 by the Staggers Act, preempts even the basic right of a state to condemn abandoned railroad lines for continuing railway purposes, indicating that such a state condemnation law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress". The Court in *Hayfield* considered the Interstate Commerce Act, in the area of abandonments, as touching a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hayfield* appears to represent a new area of federal preemption. Clearly, the Interstate Commerce Act, as amended, and read *in pari materia* with the Federal Railroad Safety Act of 1970 and the Federal Hazardous Materials Act, reflects a dominant and preempting statutory scheme in the field of transportation of hazardous materials by rail.

CONCLUSION

Petitioner does not assert that the federal railroad regulatory scheme entirely preempts state tort law. It does assert that federal laws and regulations setting standards of railroad safety for such things as track, couplers, air brakes, headlights, safety appliances, the transportation of hazardous materials, and all of the myriad things regulated by federal law, are the standards to be applied. Violation of those standards which injure a party constitute violation of a duty and create a cause of action for private individuals which may be redressed by application of traditional state tort law. However, such rules are not merely a sword for the injured plaintiff but compliance with them is necessarily a shield from unwarranted attempts by the states to penalize rail carriers beyond the bounds set by Congress. The states may regulate and declare common law standards of matters involving "essential local interests", such as speed of trains, failure to whistle at crossings, crossing protection, etc., so long

as such rules do not "burden commerce". Nonetheless, when the state goes beyond protection of essential local interests and promulgates laws, regulations or common law rules which burden commerce and assess penalties against a carrier where no negligence, fault or violation of any state or federal law, rule or regulation is shown, that such state action is impermissible by clear congressional mandate. It is now time for this Court to review and give clear definition to these concepts.

Respectfully submitted,

Bennett A. Webster,
Bruce E. Johnson,
Arthur E. Gamble,

GAMBLE, RIEPE, BURT,
WEBSTER & DAVIS
2600 Ruan Center
Des Moines, Iowa 50309,

O. L. Houts,

CHICAGO, ROCK ISLAND
AND PACIFIC RAILROAD
COMPANY
332 So. Michigan
McCormick Building
Chicago, Illinois 60604,
Attorneys for Petitioner.

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

Civil No. 76-198-2

Order

National Steel Service Center,
Plaintiff,

vs.

William M. Gibbons, Trustee of the Property of the Chicago,
Rock Island and Pacific Railroad Company,
Defendant.

Plaintiff's Motion For A Directed Verdict

(Filed March 27, 1980)

A jury trial in the above-entitled matter was conducted during the week of March 17, 1980. The case was submitted to the jury on March 21, 1980. In response to the special interrogatories propounded to them by the Court, the jury found that the defendant was not laible to the plaintiff under the theory of res ipsa loquitur and found further that the monetary value of the damages to plaintiff's building was \$443,623.00. The matter is now before the Court on plaintiff's motion for a directed verdict on the grounds of strict liability that was made at the close of plaintiff's evidence and renewed after the close of all evidence. Defendant has stipulated that if strict liability is applicable to this case, defendant would be liable for the amount of damages fixed by the jury. The only question facing the Court, therefore, is whether the doctrine of strict liability is applicable under the circumstances involved herein.

This case arose out of a derailment and explosion of propane filled tank cars being transported by defendant's railroad. The tank cars, which were owned by parties other than defendant, had been tendered to defendants by another railroad and defendant had a legal obligation to transport the cars regardless of their contents. See 49 U.S.C. §11101(a). The explosion — the precise cause of which cannot be determined — resulted in significant damage to plaintiff's building that was located near the scene of the accident.

It is plaintiff's contention that defendant should be strictly liable for any damage resulting from its participation in the ultrahazardous activity of transporting propane gas. Defendant argues that the general rule regarding strict liability for those who participate in ultrahazardous activities should not be applied in this case because the defendant was obligated by law to transport the tank cars and should not, therefore, be subjected to bear a risk that they did not, voluntarily, assume.

Resolution of the strict liability controversy now before the Court must be premised on Iowa law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

The Iowa courts have consistently adhered to the rule that "one who engages in an activity on his own land of such hazardous nature as to involve risk of harm to the person, land, or chattels of neighboring parties . . . is liable for the consequences proximately resulting therefrom without regard to the degree of care, scientific manner in which done, purpose, or motive." *Davis v. L & W Construction Company*, 176 N.W. 2d 223, 224-25 (Iowa 1970). It is not clear, however, whether the Iowa courts would extend such liability to common carriers that are transporting hazardous substances. The only Iowa authority relating to common carrier liability in such circumstances was decided in 1887. In *Walker v. Chicago, Rock Island & Pacific Railroad Co.*, 71 Iowa 658, 33 N.W. 224 (1887), where a dynamite filled railroad car that was stored on defendant's train

lot exploded, the Iowa Supreme Court found that the defendant was not liable for any damages caused thereby unless negligence by the defendant was established. *Id.* at 225-26. Because the matter currently before the Court involves more active participation in a hazardous activity by the railroad — transportation as opposed to storage of dangerous cargo — and because of the significant evolution of the law relating to torts since the time of the above cited Iowa authority, the Court finds that the *Walker* case should not automatically be accepted as the current Iowa rule.

Defendant argues that because common carriers are obligated by law to transport dangerous cargo, the rule established in the *Walker* case should be retained. Defendant argues further that it would be unfair to place the railroad in the position of an insurer for risks that have not been undertaken voluntarily. The restatement and cases from several jurisdictions other than Iowa are in accord with defendant's position. See *Acctiesselskabet Ingrid v. Central Railroad Co. of New Jersey*, 216 F. 72 (2d Cir. 1914); *Christ Church Parrish v. Cadet Chemical Corp.*, 25 Conn. Sup. 91, 199 A 2d 707 (1964); *Pope v. Edward M. Rude Carrier Corp.*, 138 W. Va. 218, 75 S.E. 2d 584 (1953); *Hertz v. Chicago, Indiana and Southern Railroad Co.*, 154 Ill. App. 80 (1910); A.L.I. Restatement of Torts 2d §521.

Plaintiff urges the Court to adopt a second, more recent line of authority that does impose strict liability on common carriers. See *Chavez v. Southern Pacific Transportation Co.*, 413 F. Supp. 1203 (E.D.Cal. 1976); *Siegler v. Kuhlman*, 81 Wash. 2d 448, 502 P. 2d 1181 (1972). See also *McLane v. Northwest Natural Gas Co.*, 255 Or. 324, 467 P. 2d 635 (1970). In *Chavez v. Southern Pacific Transportation Co.*, the District Court for the Eastern District of California in a thorough and well-reasoned opinion found that when the conduct by an innocent party of an ultrahazardous activity results in injury to another innocent party, liability for the injury should fall on the party

that is in the best position to distribute the loss arising therefrom. The *Chavez* court found that between the carrier and the victim, it was the carrier that benefitted from the conduct of the activity and that the carrier was in the best position to fairly distribute the impact of the risk by securing an adjustment in its rates to reflect the risk involved in the course of its business. *Id.* at 1209. The Iowa courts have found that such allocation of risks is an appropriate justification for the imposition of strict liability in other contexts. See *Hawkeye Security Insurance Co. v. Ford Motor Co.*, 174 N.W. 2d 672, 684 (Iowa 1970).

The Court finds that the modern trend, represented by *Chavez*, is the most sensible approach to a difficult problem. There is no dispute regarding the fact that the transport of propane gas in this case was an ultrahazardous activity. Although the railroad was compelled to transport the propane filled tank cars, it was also the party benefitting from so doing. The rule requiring carriers to transport dangerous substances is designed to benefit the public by making useful but hazardous materials available to locations where they are needed. The railroad is in a much better position with the public benefit to the public at large. Plaintiff, National Steel, was an innocent victim in this matter and should not be compelled to bear the full brunt of the risk associated with a dangerous but necessary activity that affords it no direct benefit.

Defendant's Motion For Directed Verdict

On March 26, 1980, defendant filed a motion for directed verdict on the issues of specific negligence and strict liability.

The Court feels that defendant's motion to direct a verdict on the negligence issue has already been granted on the record in this matter; but to ensure clarity, the Court will formally Order that such motion be granted at this time.

The major issues regarding defendant's motion for directed verdict on the issue of strict liability have been hereinbefore discussed. Defendant's motion does, however, raise two additional issues. Defendant argues that the Interstate Commerce Act preempts liability based on state law. Though the federal act has been held to preempt state regulation of the railroad industry, it does not abrogate the common law regarding torts. Nor has defendant cited a section of the federal act that either directly or impliedly exempts the railroad from tort liability under any theory.

Defendant also argues that the railroad did not have exclusive control over the tank cars at the time plaintiff's damages were caused. Such argument is relevant to the negligence theory of *res ipsa loquitur* but is not relevant to the issue of strict liability. Defendant does not dispute the fact that the train was engaged in the ultrahazardous activity of transporting propane gas at the time the damage-causing explosion occurred.

Defendant has offered no rationale to support a denial of plaintiff's claim based on strict liability.

In accordance with the foregoing.

IT IS ORDERED that judgment be entered in favor of Plaintiff and against Defendant on the basis of strict liability (Plaintiff's Count III) for \$443,623.00.

IT IS FURTHER ORDERED that Defendant's motion be and is hereby granted insofar as it seeks a directed verdict on the claims of specific negligence.

Dated this 27th day of March, 1980.

/s/ R. E. LONGSTAFF
U. S. MAGISTRATE

APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF IOWA - CENTRAL DIVISION**

Civil Act File No. 76-198-2

National Steel Service Center

vs.

William M. Gibbons, Trustee of the Property of the
Chicago, Rock Island and Pacific Railroad Company

JUDGMENT

(Filed March 28, 1980)

This action came on for trial before the Court and a jury, Honorable Harold D. Vietor, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that judgment is hereby entered in favor of the plaintiff, National Steel Service Center, and against the defendant, William M. Gibbons, Trustee of the Property of the Chicago, Rock Island and Pacific Railroad Company, on the basis of strict liability for Four Hundred Forty-Three Thousand Six Hundred Twenty-Three Dollars and 00/00 Cents (\$443,623.00) and the costs of this action;

IT IS FURTHER ORDERED AND ADJUDGED that defendant's motion is hereby granted insofar as it seeks a directed verdict on the claims of specific negligence.

Dated at Des Moines, Iowa, this 28th day of March, 1980.

/s/ James R. Rosenbaum
Clerk of Court

APPENDIX C

IN THE SUPREME COURT OF IOWA

National Steel Service Center, Inc.,

Appellee,

vs.

William M. Gibbons, Trustee of the Property of the
Chicago, Rock Island and Pacific Railroad Company,

Appellant.

Certified question of law from United States Court of Appeals
for the Eighth Circuit.

Certified question concerning whether the doctrine of strict
liability for abnormally dangerous activities applies to common
carriers. CERTIFIED QUESTION ANSWERED.

(Filed May 19, 1982)

Bruce E. Johnson, and Arthur E. Gamble of Gamble, Riepe,
Burt, Webster & Davis, Des Moines, and O. L. Houts, Chicago,
Illinois, for appellant.

Robert M. Wattson, John C. Hart, and David E. Bland of
Robins, Zelle, Larson & Kaplan, Minneapolis, Minnesota, and
John A. Templer, Jr., of Davis, Hockenberg, Wine, Brown &
Koehn, Des Moines, for appellee.

Considered en banc.

McCORMICK, J.

The United States Court of Appeals for the Eighth Circuit
has certified the following question to us: "Does the theory of
strict liability for abnormally dangerous activities apply to a
common carrier under the circumstances of this case?" We
answer the question affirmatively.

The court of appeals recited the facts it deemed relevant to the certified question:

This is a civil action brought by National Steel Service Center, Inc., (National Steel) against William Gibbons, the bankruptcy trustee of the Chicago, Rock Island and Pacific Railroad Company (Rock Island) for damages resulting from a train accident on September 1, 1975. On that date, the Rock Island operated a train along its right-of-way which consisted in part of eleven tank cars loaded with propane gas. The train derailed and four tank cars exploded, resulting in extensive damage to a warehouse owned by National Steel. National Steel sought recovery under theories of *res ipsa loquitur*, specific negligence, and strict liability.

At trial, the jury ruled in favor of the defendant on the *res ipsa loquitur* claim. The district court directed a verdict for the defendant on the specific negligence theory. The court entered a directed verdict for the plaintiff on the strict liability claim. In a special interrogatory, the jury found that National Steel suffered \$443,623 in damages as a result of the explosion, and judgment was entered accordingly.

The certification was in response to a motion by the Rock Island asking the court of appeals to certify to this court the question of whether the theory of strict liability was properly applied in the federal action.

The parties agree that this court has previously adopted the doctrine of strict liability for abnormally dangerous activities in blasting cases. The leading case is *Watson v. Mississippi River Power Company*, 174 Iowa 23, 156 N.W. 188 (1916). The court's adherence to the doctrine has been mentioned in other cases. See *Davis v. L. & W. Construction Company*, 176

N.W.2d 223, 224-25 (Iowa 1970); *Lubin v. Iowa City*, 257 Iowa 383, 389, 131 N.W.2d 765, 769 (1964); *Monroe v. Razor Construction Co.*, 252 Iowa 1249, 1251-52, 110 N.W.2d 250, 252 (1961); *Pumphrey v. J.A. Jones Construction Company*, 250 Iowa 559, 561, 94 N.W.2d 737, 738 (1959). In *Davis*, the court said the rule is that "if one engages in an activity on his own land of such hazardous nature as to involve risk of harm to the person, land or chattels of neighboring parties, he is liable for the consequences proximately resulting therefrom without regard to degree of care, scientific manner in which done, purpose or motive." 176 N.W.2d at 225. The doctrine stems from the famous English case of *Rylands v. Fletcher*, 3 H. & C. 774 (1865), *rev'd* L.R. 1 Ex. 265 (1866), *aff'd* L.R. 3 H.L. 330 (1868). See *Lubin*, 257 Iowa at 386-90, 131 N.W.2d at 768; W. Prosser, *The Law of Torts* § 78 (4th ed. 1971).

The doctrine is incorporated in *Restatement (Second) of Torts* § 519 (1977):

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

The reason for the rule is explained in Comment d:

The liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity. It is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur. The defendant's enterprise, in other words, is required to

. . .

pay its way by compensating for the harm it causes, because of its special, abnormal and dangerous character.

Factors for determining whether an activity is abnormally dangerous are delineated in § 520.

Rock Island appears to concede that the strict liability doctrine would apply in this case if it were not a common carrier. It does not deny, for example, that transporting liquified propane gas is an abnormally dangerous activity within the strict liability rule. Therefore we pass that issue. We note, however, that transporting gasoline has been recognized as uniquely hazardous. See *Siegler v. Kuhlman*, 81 Wash. 2d 448, 454, 502 P.2d 1181, 1184 (1972), *cert. denied*, 411 U.S. 983, 93 S. Ct. 2275, 36 L. Ed. 2d 959 (1973). The explosive propensity of propane gas has also been demonstrated. See *Farmers Butane Gas Co. v. Walker*, 489 S.W.2d 949, 951-52 (Tex. Civ. App. 1973).

The determinative issue presented by the certified question is whether this court will adopt the common carrier exception to the strict liability rule. In making that choice we are confronted with two lines of authority.

One line holds that a common carrier that is required to carry abnormally dangerous cargo offered to it for carriage should not be held strictly liable. The leading case for this view is *Actiesselskabet Ingrid v. Central Railroad Co.*, 216 F. 72 (2nd Cir.), *cert. denied*, 238 U.S. 615, 35 S. Ct. 284, 59 L. Ed. 1490 (1914):

We think there can be no doubt, so far as a common carrier is concerned, that such danger as necessarily results to others from the performance of its duty, without negligence, must be borne by them as an unavoidable incident of the lawful performance of legitimate business It certainly would be an extraordinary doctrine for courts of justice to promulgate to say that a common carrier is

under legal obligation to transport dynamite and is an insurer against any damage which may result in the course of transportation, even though it has been guilty of no negligence which occasioned the explosion which caused the injury. It is impossible to find any adequate reason for such a principle.

Id. at 78; see *Town of East Troy v. Soo Line Railroad Co.*, 409 F. Supp. 326 (E.D. Wis. 1976); *Christ Church Parish v. Cadet Chemical Corp.*, 25 Conn. Supp. 191, 199 A.2d 707 (1964); *Pope v. Edward M. Rude Carrier Corp.*, 138 W. Va. 218, 75 S.E.2d 584 (1953).

The second line of authority, shorter but more recent, does not recognize the common carrier exception. The leading case for this view is *Chavez v. Southern Pacific Transportation Co.*, 413 F. Supp. 1203 (E.D. Cal. 1976), where the court found that the common carrier exception would not be recognized in California. The court based its decision on the California Supreme Court's use of risk distribution analysis in imposing strict liability in tort in such cases as *Greenman v. Yuba Power Product, Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963). The *Chavez* court reasoned that the common carrier or "public duty" exception is based only on a consideration that it is unfair to impose liability on a carrier for engaging in an activity required by the public. It added:

But, there is no logical reason for creating a "public duty" exception when the rationale for subjecting the carrier to absolute liability is the Carrier's ability to distribute the loss to the public. Whether the carrier is free to reject or bound to take the explosive cargo, the plaintiffs are equally defenseless. Bound or not, Southern Pacific is in a position to pass along the loss to the public. Bound or not, the social and economic benefits which are ordinarily derived from imposing strict liability are achieved. Those which

benefit from the dangerous activity bear the inherent costs. The harsh impact of inevitable disasters is softened by spreading the cost among a greater population and over a larger time period. A more efficient allocation of resources results. Thus, the reasonable inference to be drawn from the adoption of the risk distribution rationale in *Smith v. Lockheed Propulsion Co.*, [247 Cal. App. 2d 774, 56 Cal. Rptr. 128 (1967)] is that California would follow the path of the Supreme Court of Washington in *Siegler v. Kuhlman*, *supra*, and find that carriers engaged in ultrahazardous activity are subject to strict liability.

413 F. Supp. at 1214. Strict liability was also imposed in *Siegler v. Kuhlman*, and the *Chavez* rationale was endorsed and applied in *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 517 F. Supp. 314 (N.D. Ill. 1981), a suit against a manufacturer.

Rock Island contends this court has already recognized the common carrier exception and, since it is the better view, should adhere to that position. We do not believe, however, that the issue has been answered in prior cases, and we believe, in any event, that the *Chavez* line of authority represents the better view.

Common carrier liability for ultrahazardous activity was involved in *Walker v. Chicago, Rock Island and Pacific Railroad Co.*, 71 Iowa 658, 33 N.W. 224 (1887). On appeal this court held that the evidence was insufficient to support submission of the case on the theory of negligence relied on by the plaintiff. No claim of liability without fault was made. Subsequently the *Walker* holding was erroneously distinguished in dicta as based on a rule that a carrier could be held liable only for negligence. *Watson v. Mississippi Power Company*, 174 Iowa at 35, 156 N.W. at 193. In later cases the court did refuse to impose strict liability on private contractors engaged in blasting pursuant to

public contracts. Those cases, however, were based on a theory that the contractors should enjoy the same immunity for the activity that the government would have had. See *Monroe v. Razor Construction Co.*, 252 Iowa at 1252, 110 N.W.2d at 252; *Pumphrey v. J.A. Jones Construction Company*, 250 Iowa at 562, 94 N.W.2d at 738. We need not decide the current viability of those holdings. We find that this court has not previously decided the present question.

In arguing that the common carrier exception represents the better view, Rock Island attacks risk distribution analysis as applied to common carriers generally and as applied in the circumstances of this case. It also points out that the exception has been adopted by the American Law Institute in *Restatement (Second) of Torts* section 521.

In attacking risk distribution analysis as applied to carriers generally, Rock Island asserts carriers cannot raise their tariffs to cover past losses. The fallacy in this argument, however, is that risk of liability is a factor to be considered in determining tariffs. See *Akron, Canton & Youngstown Railroad Company v. Interstate Commerce Commission*, 611 F.2d 1162, 1170 (6th Cir. 1979), cert. denied, 449 U.S. 830, 101 S. Ct. 97, 66 L. Ed. 2d 34 (1980) ("A question of possible liability for damage resulting from carriage of a commodity is therefore within the Commission's jurisdiction as the regulator of the economics of interstate rail transport."). Thus, assuming tariffs cannot be increased to cover past losses, they can be adjusted to cover potential liability. Moreover, tariffs may be set at a level to assure "a reasonable and economic profit or return (or both) on capital employed in the business." 49 U.S.C. § 10704(a)(2). Rock Island cites *Consolidated Rail Corporation v. Interstate Commerce Commission*, 646 F.2d 642 (D.C. Cir.), cert. denied,

U.S. , 102 S. Ct. 587, 70 L. Ed. 2d 488 (1981), as contrary authority. The court in that case, however, merely held that the

Commission did not act illegally in rejecting certain tariffs as unreasonable when they included amounts for a safety measure that the Commission determined was unnecessary.

In challenging application of risk distribution analysis in the circumstances of this case, Rock Island points out that it is bankrupt and that, in contrast, the corporate plaintiff was insured for all but \$5,000 of its loss. We decline, however, to decide the issue of a carrier's liability for abnormally dangerous activities on the basis of the parties' relative abilities to spread the risk of loss in a particular case. To achieve a measure of uniformity and predictability, we prefer to adopt a rule for general application. We believe it is more likely in the generality of cases that a carrier will be better able to bear the loss than the party whose property is damaged. Moreover, the carrier is in a position to spread the risk of liability among the beneficiaries of its services. As in *Lubin v. Iowa City*, 257 at 391, 131 N.W.2d at 770, we think "they should bear the loss and not the unfortunate individual whose property is damaged without fault of his own." Although tort liability should not always be determined on the basis of which party can ordinarily best stand or distribute the loss, that basis is appropriate in this kind of case. See *id.* at 392, 131 N.W.2d at 771.

Here we have two parties without fault. One of them, the carrier, engaged in an abnormally dangerous activity under compulsion of public duty. The other, who was injured, was wholly innocent. The carrier was part of the dangerous enterprise, and the victim was not. The carrier was in a better position to investigate and identify the cause of the accident. When an accident destroys the evidence of causation, it is fairer for the carrier to bear the cost of that fortuity. Apart from the risk distribution concept, the carrier is also in a better position than the ordinary victim to evaluate and guard against the risk financially.

Furthermore, the carrier is in a superior position to develop safety technology to prevent such accidents, and assessment of accident costs is one means of inducing such developments:

In some cases it may be reasonably clear that only injurers, or only victims, can be looked to for advances in safety technology or other adjustments that might minimize accident costs

This analysis might explain the major pockets of strict liability in the law. These include liability for damage caused by "ultrahazardous" activities All are cases where the potential victims of the injury are not in a good position to make adjustments that might in the long run reduce or eliminate the risk of injury. It is difficult to imagine the development of cost-justifiable technologies that would . . . enable a traveler at a railroad crossing to supervise the selection and monitoring of the railroad's crew.

R. Posner, *Economic Analysis of Law* § 6.11 at 140-41 (2d ed. 1977).

We conclude that the doctrine of strict liability for abnormally dangerous activities should be applied in the circumstances of this case. In so holding we do not overlook the Restatement position. We note, however, that we are committed to a broader application of the strict liability doctrine of *Rylands v. Fletcher* than is reflected in the Restatement. We do not limit it to "ultrahazardous activity." See, e.g., *Healey v. Citizens' Gas & Electric Co.*, 199 Iowa 82, 201 N.W. 118 (1924); cf. W. Prosser, *The Law of Torts*, *supra*, at 512 ("The Restatement of Torts has accepted the principle of *Rylands v. Fletcher*, but has limited it to an 'ultrahazardous activity' of the defendant"). Nor have we limited risk distribution analysis to the products liability field. See, e.g., *Lubin*, 257 Iowa at 391, 131 N.W.2d at 770. For the reasons expressed in this opinion, we decline to adopt the

common carrier exception in *Restatement (Second) of Torts*, *supra*, section 521. Other Restatement provisions affecting the strict liability doctrine are not at issue here, and we do not pass on them.

We answer the certified question in the affirmative.

CERTIFIED QUESTION ANSWERED.

All Justices concur except Allbee and Schultz, JJ., who dissent, and Uhlenhopp, J., who takes no part.

#160, **National Steel Service Center, Inc. v. Gibbons**

ALLBEE, J. (dissenting).

I dissent because I believe that the court should adopt as our own rule the common carrier exception to the strict liability rules for abnormally dangerous activities embraced by the American Law Institute in the Restatement (Second) of Torts (1977), to wit:

§ 521 Abnormally Dangerous Activity Carried on in Pursuance of a Public Duty

The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.

This exception is explained by Comment *a* to section 521, which states in pertinent part:

[A] common carrier, in so far as it is required to carry such explosives as are offered to it for carriage, is not liable for harm done by their explosion, unless it has failed to take that car in their carriage which their dangerous character requires.

The considered view of the American Law Institute seems to me to be more authoritative and to carry much greater weight than the reasoning of the single district judge in *Chavez v. Southern Pacific Transportation Co.*, 413 F. Supp. 1203 (E.D. Cal. 1976), the decision this court builds upon to reach its ultimate rationale.

Justice Schultz joins this dissent.

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 80-1410

National Steel Service Center,
Appellee,

v.

William Gibbons, Trustee of the Property of Chicago
Rock Island and Pacific Railroad Company,
Appellant-Movant.

No. 80-1452

National Steel Service Center,
Appellant,

v.

William Gibbons, Trustee of the Property of Chicago
Rock Island and Pacific Railroad Company,
Appellee-Movant,

Appeal and Cross-Appeal from the United States District Court
for the Southern District of Iowa.

Submitted: November 26, 1982

Filed: December 2, 1982

Before GIBSON, Senior Circuit Judge, and HEANEY and ARNOLD, Circuit Judges.

HEANEY, Circuit Judge.

This is a civil action brought by National Steel Service Center, Inc., (National Steel) against William Gibbons, the bankruptcy trustee of the Chicago, Rock Island and Pacific Railroad Company (Rock Island) for damages resulting from a train accident on September 1, 1975. On that date, the Rock Island operated a train along its right-of-way which consisted in part of eleven tank cars loaded with propane gas. The train derailed and four tank cars exploded, resulting in extensive damage to a warehouse owned by National Steel. National Steel sought recovery under theories of *res ipsa loquitur*, specific negligence, and strict liability.

At trial, the jury ruled in favor of the defendant on the *res ipsa loquitur* claim. The district court directed a verdict for the defendant on the specific negligence theory. The court entered a directed verdict for the plaintiff on the strict liability claim. In a special interrogatory, the jury found that National Steel suffered \$443,623 in damages as a result of the explosion, and judgment was entered accordingly.

After judgment was entered, the Rock Island asked the district court to certify to the Iowa Supreme Court the question of whether the theory of strict liability was properly applied to this case. The district court denied the request.

On appeal, the Rock Island contended that the trial court erred in directing a verdict against it on the strict liability claim. National Steel argued that the trial court erred in directing a verdict in favor of Rock Island on National Steel's specific negligence claim and in failing to submit the issue of specific negligence to the jury on the *res ipsa loquitur* theory. The Rock

Island renewed its request to certify to the Iowa Supreme Court the question of whether the theory of strict liability was properly applied in this case.

We granted the Rock Island's request to certify the strict liability issue to the Iowa Supreme Court. On May 19, 1982, that Court, sitting *en banc*, held that:

[T]he doctrine of strict liability for abnormally dangerous activities should be applied in the circumstances of this case. In so holding we do not overlook the Restatement position. [Restatement (Second) of Torts §§ 519, 521 (1977).] We note, however, that we are committed to a broader application of the strict liability doctrine of *Rylands v. Fletcher* than is reflected in the Restatement. We do not limit it to "ultrahazardous activity." See, e.g., *Healey v. Citizens' Gas & Electric Co.*, 199 Iowa 82, 201 N.W. 118 (1924); cf. W. Prosser, *The Law of Torts*, *supra*, at 512 ("The Restatement of Torts has accepted the principle of *Rylands v. Fletcher*, but has limited it to an 'ultrahazardous activity' of the defendant . . ."). Nor have we limited risk distribution analysis to the products liability field. See, e.g., *Lubin*, 257 Iowa at 391, 131 N.W.2d at 770. For the reasons expressed in this opinion, we decline to adopt the common carrier exception in *Restatement (Second) of Torts*, *supra*, section 521. Other Restatement provisions affecting the strict liability doctrine are not at issue here, and we do not pass on them.

National Steel Service Center v. Gibbons, 319 N.W.2d 269, 273 (Iowa 1982). We accept this statement of the Iowa law as binding on this Court.

Subsequent to the decision of the Iowa Supreme Court, the Rock Island filed supplementary briefs with this Court in which it contends that federal transportation law preempts the power

of an Iowa state court to place liability without fault upon the trustee of an interstate rail carrier, who under the circumstances of this case has acted in conformity with federal and state regulations and without negligence.

We implicitly decided this question against the Rock Island when we agreed with the Rock Island that its liability hinged upon an unsettled question of state law and certified that question to the Iowa Supreme Court. We expressly affirm that determination now. See *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Southern Pacific Transportation Co. v. United States*, 462 F. Supp. 1193 (E.D. Cal. 1978). Having made this determination, it is unnecessary for us to consider whether there is merit to National Steel's remaining contentions.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH
CIRCUIT.

APPENDIX E

Table of Contents of Petitioner's Brief in the Court of Appeals for the Eighth Circuit filed prior to Certification to the Supreme Court of Iowa:

TABLE OF CONTENTS

	Page
Cases Cited	
Other Authorities	
Statement of Issues Presented for Review	
Preliminary Statement	1
Summary and Request for Oral Argument	1
Statement of the Case	3
Statement of the Facts	5
Argument	11

BRIEF POINT I

The Trial Court Erred in Directing a Verdict Against the Trustee Which Held the Trustee, a Common Carrier, Liable Without Proof of Fault for Insured Property Damage Sustained by a Large National Corporation as a Result of the Explosion of Liquified Petroleum Gas the Trustee was Re- quired to Accept and Carry Pursuant to a Public Duty	11
--	----

BRIEF POINT II

Federal Legislation Preempts any Iowa State Law Doctrine Attempting to Place Liability Without Fault Upon an Interstate Rail Carrier That has Operated in Conformity with Federal Regulations and Without Negligence	34
--	----

BRIEF POINT III

National Steel Waived Review of the Trial Court's Refusal to Instruct the Jury on the Presumption of Negligence Arising Under Iowa Code Ann. Sec. 327D.190 By its Failure to Comply with Federal Rule of Civil Procedure 51 '	37
---	----

BRIEF POINT IV

The Trial Court Properly Refused to Instruct the Jury on the Presumption of Negligence Arising Under Iowa Code Ann. Section 327D.190 Because National Steel's Proposed Instruction on the Statute Misstated the Law	42
---	----

APPENDIX F

Table of Contents of Petitioner's Reply Brief in the Court of Appeals for the Eighth Circuit filed prior to Certification to the Supreme Court of Iowa:

TABLE OF CONTENTS

	Page
Cases Cited	i
Other Authorities	ii
Statement of Issues	iii
Argument	1
I. Common Carriers Are Not Liable Without Fault For Damages Caused by Transportation of Hazardous Substances Under Iowa Law ..	1
II. Federal Law Preempts Iowa Law In The Field Of Railroad Safety In Interstate Commerce To The Extent That It Prohibits Imposition On An Interstate Rail Carrier Of Damages Under A State Law Theory Of Liability Without Fault	11
Comments on National Steel's Argument	5
Further Comment	8
Conclusion	13
Certificate of Service	15